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Civil Procedure -- Federal Rule 23 -- Jurisdictional Amount in Class Actions Under 23 (b)(3) -- Zahn v. International Paper Co.

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Civil Procedure—Federal Rule 23—Jurisdictional Amount in Class Actions under Rule 23(b)(3)—*Zahn v. International Paper Co.*[1]—Plaintiffs, on behalf of themselves and some two hundred other similarly situated owners and lessees of lakefront property on Lake Champlain, brought a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure against the International Paper Company, seeking compensatory and punitive damages totaling $40,000,000 for impairment of their property rights as a result of defendant's alleged pollution of the lake's waters.[2] Plaintiffs invoked federal jurisdiction under 28 U.S.C. § 1332(a),[3] alleging the requisite diversity of citizenship and amount in controversy. The defendant, however, challenged these allegations, contending that the court lacked jurisdiction over those members of the proposed class whose citizenship was not diverse to that of the defendant and also over those members who failed to meet the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1332(a).

The United States District Court for the District of Vermont rejected the defendant's first contention, stating that as long as none of the named plaintiffs in a class action lacks diversity of citizenship from the defendant, it is not necessary that all of the unnamed plaintiffs be of diverse citizenship.[4] The defendant's second contention,

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[1] 469 F.2d 1033 (2d Cir.), petition for rehearing denied, 469 F.2d 1040 (2d Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3357 (U.S. Dec. 12, 1972) (No. 72-888). The issue raised on the petition for rehearing as to the number of votes required to order a rehearing en banc is beyond the scope of this casenote.

[2] Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971), aff'd, 469 F.2d 1033 (2d Cir. 1972). Plaintiffs alleged that the discharge of untreated or inadequately treated waste from defendant's pulp- and paper-making plant had created a massive sludge blanket on the bottom of the lake, pieces of which broke off periodically and washed up on plaintiffs' property, making it unfit for any recreational or other reasonable use and permanently diminishing its value. Id. at 1034.

[3] Section 1332 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States . . . .

28 U.S.C. § 1332(a)(1) (1970).

[4] 53 F.R.D. at 430-31, citing Snyder v. Harris, 394 U.S. 332, 340 (1969), and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

In *Ben-Hur*, the Supreme Court held that where federal jurisdiction is established over a plaintiff class, the rights of citizens of the defendant's state who are otherwise properly members of the class will be concluded by the decree in the class action. The Court reasoned:

> [I]f the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to a part of the same class.
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> If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. . . . If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.

Id. at 366-67. This argument would seem to be equally compelling where the jurisdictional

however, was upheld. Chief Judge Leddy found that although each of the four named plaintiffs had allegedly suffered damages in excess of $10,000, many of the unnamed plaintiffs clearly did not meet the jurisdictional amount requirement. Because of the impracticability of defining a class of only those plaintiffs whose damages exceeded $10,000, he refused to permit the action to proceed as a class action, and ordered that reference to all persons other than the four named plaintiffs be stricken from the complaint.[5]

On appeal,[6] the United States Court of Appeals for the Second Circuit affirmed the district court's order and HELD: where the claims of the members of a class are separate and distinct, each class member must independently satisfy the jurisdictional amount requirement of $10,000.[7] In reaching this conclusion, the court relied on a 1969 Supreme Court decision, *Snyder v. Harris*,[8] which held that plaintiffs in a class action under Federal Rule 23, as amended in 1966, could not aggregate their separate and distinct claims, none of which exceeded $10,000, in order to meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a).

This note will examine the *Zahn* decision in light of *Snyder* and its antecedents. It will be submitted that *Zahn* was factually distinguishable from *Snyder* and that the majority's reliance on *Snyder* in the *Zahn* case was both unnecessary and undesirable. Rather, the note will argue, in a case where a federal district court has jurisdiction over one or more plaintiffs in an otherwise properly maintainable class action, the court can and should extend its ancillary jurisdiction to those members of the class who fail independently to meet the juris-

deficiency pertains to the amount in controversy rather than to diversity of citizenship. However, the Court in *Snyder* chose to treat the jurisdictional amount requirement differently, and in fact argued that since under the *Ben-Hur* doctrine federal jurisdiction exists where there is only minimal diversity of citizenship, aggregation of claims should not be allowed because it "could transfer into the federal courts numerous local controversies involving exclusively questions of state law." 394 U.S. at 340.

[5] 53 F.R.D. at 434. This aspect of the decision is discussed in text at note 64 infra.

[6] Plaintiffs moved for certification of Chief Judge Leddy's order under 28 U.S.C. § 1292(b) (1970). Chief Judge Leddy granted this motion and certified the order for interlocutory appeal. He deemed the controlling question of law to be "whether federal courts have jurisdiction over all members of an allegedly otherwise proper class, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirement as to the amount in controversy and others, who are not named representatives, do not." 53 F.R.D. at 434. The Second Circuit granted permission to appeal, but Circuit Judge Smith deemed the question on appeal to be "the novel question whether a diversity case will be allowed to proceed as a class action under Fed.R.Civ.P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a) but the unnamed representatives of the class do not." 469 F.2d at 1033. Thus, although in fact *some* of the unnamed plaintiffs in this case may have met the jurisdictional amount, the case was treated as if *none* of them had.

[7] 469 F.2d at 1036.

[8] 394 U.S. 332 (1969).

dictional amount requirement, and should allow the suit to proceed as a class action in the federal district court.

Historical Background

The Federal Rules of Civil Procedure were enacted in 1938. Under Rule 23 as originally enacted,[9] there were three categories of class actions: (1) "true" class actions, in which the rights of the class members were joint, common or derivative;[10] (2) "hybrid" class actions, in which the rights of the class members were several, but there was a question of fact common to all and related to identifiable property;[11] and (3) "spurious" class actions, in which the rights of the class members were several, but there was a common question of law or fact.[12]

In determining whether federal jurisdiction existed, the traditional rule was that when several plaintiffs united to enforce a single title or right in which they had a common and undivided interest, it was sufficient if their interests collectively equaled the jurisdictional amount. However, when two or more plaintiffs with separate and distinct claims joined to bring a single suit, the claim of each had to meet the jurisdictional amount.[13] This aggregation doctrine was originally enunciated in joinder cases, but was applied to class actions because "as constituted under original Rule 23 [class actions] were but procedural devices to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants."[14] Thus, in class actions under original Rule 23, aggregation of the claims of class members in order to meet the jurisdictional require-

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[9] When promulgated by the Supreme Court in 1938, Rule 23 provided, in pertinent part:

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought . . . .

Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 689 (1938).

[10] 3B J. Moore, Federal Practice ¶ 23.08, at 2505 (2d ed. 1969).

[11] Id., ¶ 23.09, at 2571.

[12] Id., ¶ 23.10, at 2602-03.

[13] Pinel v. Pinel, 240 U.S. 594, 596 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40-41 (1911).

[14] 3B J. Moore, supra note 10, ¶ 23.13, at 2957.

ment was permitted in true class actions, but not in hybrid or spurious class actions.[15]

In 1966, however, the Supreme Court adopted amendments to the Federal Rules of Civil Procedure, which included a revision of Rule 23.[16] The new Rule 23 abolished the former categories of class

[15] Id. at 2951, 2953. See, e.g., Knowles v. War Damage Corp., 171 F.2d 15, 17-19 (D.C. Cir. 1948), cert. denied, 336 U.S. 914 (1949).

[16] The Supreme Court deleted the former Rule 23 and substituted a new rule, which provides, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. . . .

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

actions, adopting a more practical approach by describing the occasions on which a class action may be maintained.[17] The question then arose whether the old aggregation rule would continue to apply in class actions which, under the former Rule 23, would have been classified as "spurious" class actions. The Fifth Circuit, in *Alvarez v. Pan American Life Insurance Co.*,[18] and the Eighth Circuit, in *Snyder v. Harris*,[19] answered this question in the affirmative, while the Tenth Circuit, in *Gas Service Co. v. Coburn*,[20] answered the question in the negative.

In *Alvarez*, the Fifth Circuit reasoned that the new Rule 23 could not have abrogated the aggregation principle, since Rule 82 of the Federal Rules precludes construction of any rule so as to expand federal jurisdiction.[21] In the Eighth Circuit case, *Snyder v. Harris*, the plaintiffs' argument was based on the fact that under the new Rule 23 a judgment in any class action is binding on the entire class,[22] whereas under the former Rule 23 a judgment in a "spurious" class action was binding only on those members of the class named as parties to the action.[23] Therefore, plaintiffs argued, since there is no longer any equivalent of the "spurious" class action, aggregation should now be allowed in all class actions.[24] The district court, however, did not agree that it followed from changes in Rule 23 that the aggregation doctrine should no longer be applied to class actions. The court noted that the class action under the old Rule 23 was "but a procedural device to allow several plaintiffs to unite in a single suit," and observed that the new Rule 23 "contains nothing to indicate that it has now become something more than [that]."[25] Moreover, the court felt that a construction of the new rule that would confer jurisdiction

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. . . .

Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1047-49 (1966).

17 Advisory Committee's Note to Amendment to Fed. R. Civ. P. 23, 39 F.R.D. 98, 99 (1966).

18 375 F.2d 992 (5th Cir.), cert. denied, 389 U.S. 827 (1967).

19 390 F.2d 204 (8th Cir. 1968), aff'd, 394 U.S. 332 (1969).

20 389 F.2d 831 (10th Cir. 1968), rev'd sub nom. Snyder v. Harris, 394 U.S. 332 (1969).

21 375 F.2d at 995-96. The court cited Clark v. Paul Gray, Inc., 306 U.S. 583 (1939), a joinder of parties case, wherein the Supreme Court directed the district court to dismiss the case as to all plaintiffs except the one who met the jurisdictional amount requirement. See discussion in note 79 infra.

22 See Fed. R. Civ. P. 23(c)(3), quoted in note 16 supra.

23 C. Wright, Handbook of the Law of Federal Courts § 72, at 310 (2d ed. 1970); Wright, Class Actions, 47 F.R.D. 169, 175 (1970).

24 268 F. Supp. 701, 702 (E.D. Mo. 1967), aff'd per curiam, 390 F.2d 204 (8th Cir. 1968), aff'd, 394 U.S. 332 (1969).

25 268 F. Supp. at 704.

where no jurisdiction had existed in a similar situation before the amendment of the rule would be in direct violation of Rule 82, which prohibits the rules from expanding the jurisdiction of the federal district courts.[26] The Court of Appeals affirmed on the basis of the district court's opinion and the decision in *Alvarez*.[27]

In *Coburn*, on the other hand, the Tenth Circuit reasoned that one of the goals underlying new Rule 23, that of eliminating the definitional problems which existed under the old rule, would be frustrated if the former classifications were perpetuated in order to determine whether aggregation would be allowed. The court therefore defined the question as whether aggregation should be allowed under *any* circumstances.[28] It then answered this question in the affirmative, citing *Gibbs v. Buck*, a class action brought before the Federal Rules of Civil Procedure became effective, wherein the Supreme Court held that federal jurisdiction is established where the matter in controversy for any class member who is a party, or for the aggregate of all class members, is of the value of the jurisdictional amount.[29] Therefore, the *Coburn* court held, the plaintiffs could aggregate their claims and thus satisfy the jurisdictional requirement.

The Supreme Court granted certiorari in *Snyder v. Harris* and *Gas Service Co. v. Coburn* in order to resolve the conflict between the circuits.[30] In a 7-2 decision, the Court held that the aggregation rule was still applicable in class actions involving separate and distinct claims of less than the jurisdictional amount, thus affirming *Snyder* and reversing *Coburn*. The Court found that the doctrine that separate and distinct claims could not be aggregated was not based on the categories of old Rule 23 or on any rule of procedure, but rather on the Court's own interpretation of the statutory phrase "matter in controversy" in 28 U.S.C. § 1332(a) as precluding aggregation.[31] The Court also argued that any change in the Federal Rules of Civil Procedure that purported to effect such a change in the definition of "matter in controversy" would clearly conflict with the command of Rule 82 that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[32]

On these grounds, the Court concluded that the adoption of amended Rule 23 did not change the interpretation of "matter in controversy" so as to allow aggregation of separate and distinct

[26] Id.

[27] 390 F.2d at 205.

[28] 389 F.2d at 834.

[29] 307 U.S. 66, 72 (1939). This class action was brought under former Equity Rule 38. However, since the class members had a common and undivided interest in the matter in controversy, id. at 74, it would have been deemed a "true" class action under Federal Rule 23.

[30] 394 U.S. 332, 334 (1969).

[31] Id. at 336.

[32] Id. at 337.

claims in class actions.[33] The Court also refused to overrule its own established statutory interpretation of "matter in controversy."[34] In the first place, the Court believed that successive congressional amendments raising the amount in controversy without changing its jurisdictional effect implied legislative approval of the Court's earlier determination that "matter in controversy" precluded aggregation, and that in fact the legislature had taken this interpretation into account in determining the extent to which the jurisdictional amount should be raised.[35] Secondly, the Court reasoned that a change in the doctrine of aggregation as applied to class action cases would seriously undercut the purpose of the jurisdictional requirement by considerably expanding the federal caseload and, in particular, by giving the federal courts jurisdiction over state claims which could more appropriately be tried in state courts.[36]

In *Snyder*, however, *none* of the plaintiffs met the jurisdictional amount requirement of $10,000. Therefore, it is submitted, *Snyder* should not have controlled the jurisdictional question raised by *Zahn v. International Paper Co.*,[37] in which the four named plaintiffs in the class action did meet the jurisdictional requirement although unnamed plaintiffs did not. However, in *Zahn*, both the District Court for Vermont[38] and the Court of Appeals for the Second Circuit[39] read *Snyder* as compelling a dismissal of the action as to all of the plaintiffs who did not meet the $10,000 requirement. In applying the *Snyder* decision, the Second Circuit noted that although *Snyder* "does not squarely hold that every unnamed member of a proposed spurious class must individually satisfy the jurisdictional amount," there is "persuasive internal evidence" that the Supreme Court intended this result.[40]

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[33] Id. at 338.

[34] Id.

[35] Id. at 339.

[36] Id. at 339-41.

[37] 53 F.R.D. 430 (D. Vt. 1971), aff'd, 469 F.2d 1033 (2d Cir. 1972). This was the first case since *Snyder* to deal specifically with this question. But several courts of appeals, without referring to the point, have assumed either that all class members must meet the jurisdictional amount (see, e.g., Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969)) or that only one member of the class must do so (see, e.g., Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970)). Lesch v. Chicago & Eastern Illinois R.R., 279 F. Supp. 908 (N.D. Ill. 1968), is a pre-*Snyder* case which reaches a result contrary to *Zahn*. City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971), was decided after the district court decision in *Zahn*, although before the Second Circuit decision. *Inglewood* held that each plaintiff in a class action which would have been deemed "spurious" under the old Rule 23 must meet the jurisdictional amount requirement, citing *Snyder* and the *Zahn* district court opinion. However, the *Inglewood* court would dismiss individual plaintiffs from a class action as it became evident that they could not meet the jurisdictional amount, rather than dismiss the entire class action. Id. at 952-54.

[38] 53 F.R.D. 430, 433 (D. Vt. 1971).

[39] 469 F.2d at 1034.

[40] Id. at 1034-35. In particular, the Second Circuit noted that the Supreme Court in *Snyder* relied on Clark v. Paul Gray, Inc., 306 U.S. 583 (1939), discussed in note 79

The Snyder *Decision*

Any evaluation of the decision in *Zahn v. International Paper Co.* must start with a critique of the decision in *Snyder v. Harris*, upon which the *Zahn* court relied so heavily. This decision was criticized in a strong, well-reasoned dissenting opinion, and was received with disapproval by some authorities in the field of civil procedure.[41] The principal objections to the *Snyder* decision are: (1) that it reestablished the "artificial, awkward and unworkable distinctions between 'joint,' 'common,' and 'several' claims and between 'true,' 'hybrid,' and 'spurious' class actions which the amendment of Rule 23 sought to terminate";[42] and (2) that it ignored one of the fundamental purposes of Rule 23, to provide a means of vindicating claims which are too small to justify individual legal action, but which are of significant size taken as a group.[43]

Some criticism stemmed from the fact, admitted by the majority in *Snyder*, that the 1966 amendment to Rule 23 replaced the old categories of "true," "hybrid" and "spurious" classes with a functional approach to the maintenance of class actions.[44] Under the new rule, the focus is on the suitability of the particular claim for resolution in a class action rather than on the character of the right asserted.[45]

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infra, in which one of the named plaintiffs met the jurisdictional amount requirement, and cited with approval the Fifth Circuit's decision in Alvarez v. Pan Am. Life Ins. Co., 375 F.2d 992 (5th Cir. 1967), in which one member of the proposed class, albeit not a named member, met the requirement.

[41] See, e.g., Kaplan, A Prefatory Note [to Symposium on Class Actions], 10 B.C. Ind. & Com. L. Rev. 497 (1969); Bangs, Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount, 10 B.C. Ind. & Com. L. Rev. 601, 604-06 n.17 (1969).

A proposed Class Action Jurisdiction Act, S. 1980, 91st Cong., 1st Sess. (1969), was introduced in Congress shortly after the Supreme Court decision in *Snyder*. This bill was designed in part to upset the holding in *Snyder* by giving the federal district courts jurisdiction over all consumer class actions, regardless of citizenship of parties or amount in controversy, where interstate commerce is affected. Starrs, The Consumer Class Action —Part II: Considerations of Procedure, 49 B.U.L. Rev. 407, 494 (1969). The bill went to the Senate Judiciary Committee and was then up for hearing in the Senate. However, no action was taken on the bill, and it has not yet been reintroduced.

[42] *Snyder*, 394 U.S. at 343 (dissenting opinion).

[43] Ford, Federal Rule 23: A Device for Aiding the Small Claimant, 10 B.C. Ind. & Com. L. Rev. 501, 504-08 (1969), citing Escott v. BarChris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), cert. denied, 382 U.S. 816 (1965), and Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968). See Wright, Class Actions, 47 F.R.D. 169, 170 (1970); Kaplan, supra note 41, at 497; Bangs, supra note 41, at 611. The Supreme Court in *Snyder* alluded to the policies underlying Rule 23 in passing, but did not seem to find them significant in the balance. 394 U.S. at 338. The Second Circuit in *Zahn* recognized these policies and expressed sympathy with its own prior decision in *Eisen*, but found that "the policies underlying the amended rule are not determinative of this case. Rather it is clear in the light of *Snyder*, 394 U.S. at 336 . . . , that the critical focus in resolving the issue before us must be on 28 U.S.C. § 1332." 469 F.2d at 1035 (footnote omitted).

[44] *Snyder*, 394 U.S. at 335.

[45] Id. at 352 (dissenting opinion). See Advisory Committee's Note, supra note 17, at 99.

Accordingly, it is argued, once it has been decided that an action is suitable for maintenance as a class action, it should be the claim of the whole class rather than the individual claims of the separate members of the class which is the "matter in controversy."[46]

That the "matter in controversy" encompasses the claim of the entire class logically follows from provision (c)(3) of the new Rule 23.[47] Under the old Rule 23, "spurious" class actions were little more than permissive joinder devices, in that the decisions did not have binding effect on those who were not named as parties.[48] However, section (c)(3) of the new rule provides that any judgment in a class action will bind all members of the class except those who have expressly excluded themselves.[49] Hence, as one critic has concluded, "each action is designed to adjudicate the totality of the rights of the members of the class. Consequently, the amount in controversy should and must be determined by the totality of the claims to be adjudicated. The word 'aggregation' is thus probably a misnomer."[50]

The majority in *Snyder* refused to accept this interpretation of "matter in controversy" because of the prohibition in Rule 82 against the courts expanding by rule their own jurisdiction.[51] However, while it is true that a rule itself cannot compel, either by its terms or by its construction, a particular interpretation of a jurisdictional statute, a new rule does allow the Court to reevaluate its interpretation of the jurisdictional requirements in the new procedural context established by the rule.[52] To interpret the fact that Congress has raised the amount in controversy necessary for federal jurisdiction without changing its

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[46] 394 U.S. at 353 (dissenting opinion).

[47] Id.; Wright, supra note 43, at 183; Bangs, supra note 41, at 608. See Fed. R. Civ. P. 23(c)(3), quoted in note 16 supra.

[48] C. Wright, Handbook of the Law of Federal Courts § 72, at 310 (2d ed. 1970).

[49] Fed. R. Civ. P. 23(c)(3), quoted in note 16 supra; Wright, supra note 43, at 177.

[50] Bangs, supra note 41, at 613-14.

[51] 394 U.S. at 337-38. 28 U.S.C. § 2072 (1970), which, while delegating rule-making power to the Supreme Court, expressly provides that the rules "shall not abridge, enlarge, or modify any substantive right," is also pertinent, although the Court did not mention this statute. See Comment, Aggregation of Claims in Class Actions, 68 Colum. L. Rev. 1554, 1562-63 (1968).

[52] Cf. Bangs, supra note 41, at 605-06 n.17:

> The gravamen of a violation of Rule 82 is the expansion of jurisdiction beyond limits set by statute. Rule 82 does not preclude judicial reshaping of a judicially developed rule (here the boundaries of "matter in controversy") in comportment with evolving needs. [As] Mr. Justice Fortas observes, "[m]aking judicial rules for calculating jurisdictional amount responsive to the new structure of class actions is not an extension of the jurisdiction of the federal courts, but a recognition that the procedural framework in which the courts operate has been changed by a provision having the effect of law." [Quoting *Snyder*, 394 U.S. at 356 (dissenting opinion).]

Both Bangs and Fortas take the opposite view from the *Snyder* majority, reasoning that the Court is "tampering with legislative mandate" in *not* reevaluating its interpretation. Bangs, supra note 41, at 606 n.17; *Snyder*, 394 U.S. at 350, 356-59 (dissenting opinion). See Comment, Federal Jurisdiction and Procedure, The Supreme Court 1968 Term, 83 Harv. L. Rev. 202, 204 (1969).

jurisdictional effect as indicating legislative approval of this "settled interpretation" is erroneous, since "[t]he silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule . . . ."[53]

However, the Court's argument with regard to the policies underlying the jurisdictional amount requirement is significant in that some sort of balance must be struck between the conflicting policies underlying Rule 23 and 28 U.S.C. § 1332. According to Mr. Justice Black, writing for the majority in *Snyder*, the legislative purpose in successively raising the jurisdictional amount requirement has been to restrict the rising caseload of the federal courts, leaving cases involving "lesser amounts," and hence usually of lesser significance, to the state courts.[54] In the abstract, this may be sound policy. However, as applied to class actions, and in particular to the *Snyder* case, it is submitted that this policy argument lacks validity. First, a case involving $10,000 aggregated damages does not involve a "lesser amount" than a case involving $10,000 damages to a single plaintiff; and a case involving a claim of $10,000 (or several claims of $10,000 each, as in the *Zahn* case) *plus* several small claims certainly does not involve a "lesser amount" than a case involving one claim of $10,000. Second, in relegating these class actions to the state courts, the Court presupposes the existence of a state procedural device under which plaintiffs could bring their class action.[55]

In view of the policy that a 23(b)(3) class action should "achieve economies of time, effort, and expense,"[56] it could of course be argued that in a situation where the plaintiffs' claims are too small to allow them to bring individual suits, it would be more "economical" to avoid the class action altogether. However, it is more advantageous to resolve a multiparty controversy in a single sitting than to conduct separate trials for each plaintiff. Furthermore, Rule 23(b)(3) is concerned not only with efficiency and economy, but also with *fairness*. The rule itself purports to provide for the "*fair* and efficient adjudication of the controversy."[57] It is submitted that dismissal of the class action in *Snyder* because the individual claims are too small to be individual actions is neither fair nor an adjudication of the

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[53] Girouard v. United States, 328 U.S. 61, 70 (1946); *Snyder*, 394 U.S. at 348-50 (dissenting opinion).

[54] 394 U.S. at 339-40.

[55] See *Zahn*, 469 F.2d at 1040 (dissenting opinion). Even if such a device exists, absent an applicable long-arm statute plaintiffs will be forced to bring their suit in the defendant's state in order for the court to have jurisdiction over the person of the defendant. This forum may be less than ideal for those plaintiffs of diverse citizenship from defendants, since theoretically that forum may be biased in favor of defendants, its own citizens.

[56] Advisory Committee's Note, supra note 17, at 102.

[57] Fed. R. Civ. P. 23(b)(3) (emphasis added).

controversy.[58] If the small claimant in a class action has legitimate grievances, he should not be foreclosed from any remedy.

The Zahn *Decision*

In view of the criticism with which the *Snyder* decision was met, it is surprising that, when *Zahn* came before it, the Second Circuit felt that the decision in *Snyder* should be extended beyond its own facts.[59] In reality, *Zahn* is not an aggregation case at all, since the plaintiffs did not need to add together their claims in order to satisfy the jurisdictional amount. Rather, each of the four named plaintiffs satisfactorily pleaded federal jurisdiction without reference to any of his co-plaintiffs. On its facts, then, *Zahn* is readily distinguishable from *Snyder*.[60]

Moreover, the policies which the *Snyder* majority felt compelled the outcome in *Snyder* are inapplicable in *Zahn*. Since the federal district court has jurisdiction over the four named plaintiffs and will have to adjudicate their claims in any event, the "federal caseload" argument of *Snyder* lacks merit.[61] Allowing the unnamed plaintiffs to join their claims and be heard by the same court would not substantially increase the burden on the federal courts, as the certification of a Rule 23(b)(3) class action presupposes predominant questions of law and fact common to all the claims.[62] Moreover, in terms of overall efficiency,

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[58] Cf. Comment, Rule 23: Categories of Subsection (b), 10 B.C. Ind. & Com. L. Rev. 539, 546-47 (1969).

[59] Cf. *Zahn*, 469 F.2d at 1036 (dissenting opinion): "[T]he majority reads the Supreme Court's decision in Snyder v. Harris . . . for all it might be worth, rather than for the least it has to be worth."

[60] Cf. Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905, 907-08 (N.D. Ill. 1966). This was a joinder case, where one plaintiff met the jurisdictional amount requirement and its co-plaintiff did not. Chief Judge Campbell denied defendants' motion to dismiss the co-plaintiff for lack of jurisdiction, distinguishing this case from a case where plaintiffs whose individual claims were all less than the jurisdictional amount aggregated those claims in order to meet the requirement. Accord, General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968).

[61] Cf. *Johns-Manville*, 261 F. Supp. at 907.

[62] Fed. R. Civ. P. 23(b)(3); *Zahn*, 469 F.2d at 1039 (dissenting opinion). It is true that once defendant's liability is established (*if* it is), the burden on the court will be increased to the extent that it must assess the damages suffered by each individual plaintiff, since their claims are separate and distinct. Id. at 1036. However, where the plaintiffs' claims arise from the same operative facts, the fact that there are "differences among the class members [which] bear only on the computation of damages [is] a factor which, by itself, does not justify dismissal of the class action." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 556 (2d Cir. 1968). See Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966); City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506, 514 (E.D. Pa. 1965). In Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968), the court reasoned:

> [T]he situation should be considered and compared to that which would exist were no class action to be allowed. . . . It seems specious and begging the question to say that if . . . 500 law suits were brought into a class so that

federal jurisdiction over these claims is desirable in order to prevent duplicative litigation.[63] Those persons who also have claims in excess of $10,000 may now initiate their own actions in federal district court. All members of the proposed class can try to litigate their claims in state courts. Thus, striking the class action allegations in these circumstances will increase the judiciary's burden.

When he reluctantly dismissed the action as to all but the four named plaintiffs, Chief Judge Leddy gave as a ground for his decision the impracticability of defining, from among the class then before him, a class whose members had each sustained $10,000 in damages. In order to determine the bounds of res judicata, each class member would have to appear to plead or prove amount in controversy. There would then be no advantage in maintaining a suit as a class action under Rule 23(b)(3) rather than as a joinder action under Rule 20(a). Therefore, the judge reasoned, the suit would not be maintainable as a class action, since Rule 23(b)(3) requires that a class action be superior to other available methods of adjudicating the controversy.[64]

This result suggests a difficulty inherent in the rule of *Zahn* that each class member must meet the jurisdictional amount requirement. This rule precludes utilization of Rule 23(b)(3) in many civil actions, since both section 1332(a)[65] (diversity of citizenship jurisdiction) and section 1331(a)[66] (federal question jurisdiction) require a $10,000 amount in controversy. The difficulty with the *Zahn* rule, then, is that it compels the conclusion that 23(b)(3) class actions are limited to those types of suits for which Congress has granted federal jurisdiction regardless of jurisdictional amount.[67]

In any event, it is submitted that the Second Circuit could have interpreted *Snyder* with more flexibility than it did in *Zahn*. Although *Snyder* admittedly precluded the Second Circuit from allowing plaintiffs to aggregate their claims in order to meet the jurisdictional amount requirement, it did not necessarily foreclose the finding of some other basis of jurisdiction over the proposed class. Circuit Judge Timbers, dissenting in *Zahn*, proposed that federal jurisdiction be extended to

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proof on the [common issue] need be adduced only once and the result then becomes binding on all 500, that thereby the common issue . . . no longer predominates because from a total time standpoint, cumulatively individual damage proof will take longer.

The net result is an ultimate conservation of judicial resources.

[63] *Zahn*, 469 F.2d at 1039 (dissenting opinion); cf. *Johns-Manville*, 261 F. Supp. at 907.

[64] *Zahn*, 53 F.R.D. at 433-34.

[65] 28 U.S.C. § 1332(a) (1970). This provision is quoted in part in note 3 supra.

[66] Section 1331(a) provides:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331(a) (1970).

[67] E.g., 28 U.S.C. § 1343 (1970) (civil rights and elective franchise).

the unnamed members of a class such as that in *Zahn* via the doctrine of ancillary jurisdiction.[68] Under that doctrine, "if a case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and therefore can adjudicate *related claims of ancillary parties who have no independent jurisdictional grounds*."[69] Once the federal court has jurisdiction of the principal action, it may decide ancillary matters "regardless of the citizenship of the parties, *the amount in controversy*, or any other factors that would normally determine jurisdiction."[70] The stated purpose behind the doctrine of ancillary jurisdiction—"to effectuate judicial economy and efficiency, to prevent piecemeal litigation of connected claims which would otherwise result from the limited jurisdiction of the federal courts, but most importantly, to render more complete justice and convenience to litigants"[71]—makes the extension of this doctrine to the *Zahn* situation extremely appropriate.

In recent years, some federal courts have readily extended ancillary jurisdiction in order "to solve jurisdictional problems, such as lack of diversity or *amount in controversy*, which were often attendant upon utilization of joinder procedures" available under the Federal Rules of Civil Procedure.[72] The courts have recognized that these joinder provisions "would have limited effect if the same jurisdictional and venue requirements were to be applied in the case of added parties as to the action between the original parties,"[73] and have extended the concept of ancillary jurisdiction to cases arising under these provisions "in an effort to balance federal jurisdictional requirements with the liberal provisions of the Rules as to additional parties."[74]

The concept has not yet been applied uniformly to all of the Rules. Thus, it has generally been held that ancillary jurisdiction may apply to compulsory counterclaims under Rule 13(a), cross claims under Rule 13(g), impleader under Rule 14, interpleader under Rule 22, and intervention as of right under Rule 24(a).[75] On the other hand, ancillary jurisdiction generally is not extended to permissive

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68 469 F.2d at 1036 (dissenting opinion).

69 Id. (emphasis added); see C. Wright, Handbook of the Law of Federal Courts § 9, at 19 (2d ed. 1970).

70 Wright, supra note 69, § 9, at 19 (emphasis added).

71 Lucas v. Seagrave Corp., 277 F. Supp. 338, 348 (D. Minn. 1967). See *Johns-Manville*, 261 F. Supp. at 907; Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts, 33 F.R.D. 27 (1963).

72 *Zahn*, 469 F.2d at 1036 (dissenting opinion) (emphasis added). Although the decisions in the various jurisdictions and under the various rules have not always been consistent, the recent trend has been toward increased recognition of the validity of the doctrine in joinder actions under the Federal Rules. See generally Wright, supra note 69, § 9; Fraser, supra note 71.

73 Brandt v. Olson, 179 F. Supp. 363, 370 (N.D. Iowa 1959).

74 Id. See Wright, supra note 69, § 9, at 20; Fraser, supra note 71, at 27.

75 Wright, supra note 69, § 9, at 21.

counterclaims under Rule 13(b)[76] or permissive intervention under Rule 24(b).[77]

As was the case with the aggregation doctrine, analogies can most appropriately be drawn between class actions under Rule 23 and joinder of parties under Rule 20(a). There is conflicting authority as to whether joinder of parties will be allowed in a diversity case where one co-party meets the jurisdictional requirements and another co-party, with a claim arising from the same operative facts, does not; but the recent trend seems to be toward allowing joinder in this situation.[78]

In *Clark v. Paul Gray, Inc.*, a 1939 Supreme Court decision, the Court sua sponte raised the question of jurisdictional amount, found that of the fourteen appellees only Paul Gray, Inc. had established the jurisdictional amount with respect to its claim, and dismissed the suit as to all appellees except Paul Gray, Inc.[79] Thus, although the question of ancillary jurisdiction was not as such before the Court, it would appear that the Supreme Court, at that time at least, did not consider the doctrine applicable to that fact situation.

In a more recent decision, however, *United Mine Workers of America v. Gibbs*, the Supreme Court held that where a plaintiff asserts both a federal and a state claim deriving from a "common nucleus of operative fact," such that, considered without regard to their jurisdictional sufficiency, the plaintiff would ordinarily be expected to try

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[76] Id. Even here there is an exception to the rule: no independent jurisdictional grounds are required for a permissive counterclaim if it is in the nature of a set-off and is used to reduce plaintiff's judgment rather than as a basis for affirmative relief. Id., § 79, at 351.

[77] Id., § 9, at 21.

[78] *Zahn*, 469 F.2d at 1037 (dissenting opinion). Joinder was allowed in, e.g.: Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966); Wiggs v. City of Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); Morris v. Gimbel Bros., Inc., 246 F. Supp. 984 (E.D. Pa. 1965); and Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960).

However, jurisdiction was denied in, e.g.: Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Jewell v. Grain Dealers Mut. Ins. Co., 290 F.2d 11 (5th Cir. 1961); Aetna Ins. Co. v. Chicago, Rock Island & Pacific R.R., 229 F.2d 584 (10th Cir. 1956); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), cert. denied, 313 U.S. 559 (1941); Rompe v. Yablon, 277 F. Supp. 662 (S.D.N.Y. 1967); Diana v. Canada Dry Corp., 189 F. Supp. 280 (W.D. Pa. 1960); and Diepen v. Fernow, 1 F.R.D. 378 (W.D. Mich. 1940).

[79] 306 U.S. 583, 590 (1939). The majority opinions in *Zahn* and *Snyder* both cite Clark v. Paul Gray, Inc., characterizing it as a class action. 469 F.2d at 1035; 394 U.S. at 336-37. The dissenting judge in *Zahn*, however, claimed it was merely a case of permissive joinder. 469 F.2d at 1039. An examination of the record in the *Clark* case supports the dissent's viewpoint. Plaintiffs were five corporations, two partnerships and seven individuals seeking injunctive relief from the enforcement of a California statute as against themselves rather than all those similarly situated.

them in one judicial proceeding, a federal court has adjudicative power over the state claim by means of pendent jurisdiction.[80] This concept is a particularized form of ancillary jurisdiction, relating solely to joinder of federal and state claims.[81] But it has been argued that, by the same token, a diversity claim should be allowed where another diversity claim involving the same operative facts has been properly brought in the federal courts. Thus, in *Jacobson v. Atlantic City Hospital*,[82] the Third Circuit allowed an executor to bring a malpractice suit against a hospital and two physicians, despite the fact that recovery from the hospital was limited by statute to less than the jurisdictional amount required, because there was no such limitation with regard to the two co-defendants. Similarly, the Fourth Circuit in *Stone v. Stone*[83] allowed a settlor to bring a tort action against her grandson and her daughter-in-law for misappropriation of trust funds, although her claim against the grandson was for less than the jurisdictional amount. In both cases, the courts cited *Gibbs* as analogical support for their decisions.[84] The *Stone* court reasoned: "In each situation [the federal question situation and the diversity situation], the federal court has before it a claim which clearly satisfies the requirements of § 1331 or § 1332, and in each instance the plaintiff asserts an additional claim which, if litigated alone, would not satisfy a jurisdictional requirement."[85] The *Gibbs* rule for federal question cases ought therefore to be applicable to multi-claim diversity cases as well.[86]

Similarly, the *Gibbs* rule has been extended to situations where multiple plaintiffs sue on separate claims against a single defendant. Thus, in *Wilson v. American Chain & Cable Co.*,[87] where a father brought suit on behalf of his minor child for injuries due to defendant's negligence in the design of a lawn mower, the Third Circuit allowed the father to join his own claim for damages resulting from the child's injury with the claim of his son, although the father's claim by itself was jurisdictionally insufficient. Citing *Gibbs*, the court went on to say that although pendent jurisdiction usually involved one plaintiff,[88] it could also apply where there were two plaintiffs with claims

80 383 U.S. 715, 725 (1966).

81 Wright, supra note 69, § 19, at 65; *Zahn*, 469 F.2d at 1037 (dissenting opinion).

82 392 F.2d 149 (3d Cir. 1968).

83 405 F.2d 94 (4th Cir. 1968).

84 392 F.2d at 155; 405 F.2d at 97.

85 405 F.2d at 97.

86 Id. at 98; *Jacobson*, 392 F.2d at 155.

87 364 F.2d 558 (3d Cir. 1966).

88 Note in this regard that unless the defendant, International Paper Co., at the time of suit had ceased to operate its plant or had lowered its pollution level to an acceptable standard, the plaintiffs in *Zahn* could have avoided dismissal of their action if they had included in their complaint a claim for injunctive relief under Rule 23(b)(2). In injunction actions the matter in controversy is determined by the value of the right to be protected or the extent of the injury to be prevented. Wright, supra note 69, § 33, at 116. See, e.g., Pennsylvania R.R. v. City of Girard, 210 F.2d 437, 439 (6th Cir. 1954).

arising from the same occurrence.[89] In a subsequent case, *Newman v. Freeman*, it was not deemed significant that the "two plaintiffs" in *Wilson* were actually one person suing in different capacities.[90]

In *Hatridge v. Aetna Casualty & Surety Co.*,[91] the concept of ancillary jurisdiction was utilized to *compel* a plaintiff with a claim of less than $10,000 to appear in federal court. Mrs. Hatridge instituted an action in a state court to recover on a default judgment for loss of consortium. Although the amount of the judgment was greater than $10,000, she sought $9,999.99, waiving her right to recover anything in excess of this amount. Aetna removed the action to the federal district court, whereupon Mrs. Hatridge moved to remand. This motion was denied by the district court, and the denial of the motion was affirmed by the Eighth Circuit, with the then Circuit Judge Blackmun writing the opinion of the court. The court held that, even assuming Mrs. Hatridge's waiver to be effective, her claim was ancillary to her husband's pending claim for personal injuries, and that federal jurisdiction over his claim supported federal jurisdiction over hers and in fact prevented her from separating her claim in order to gain access

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In *Zahn*, both the right of each plaintiff to live in an environment free from excessive pollution, and the right of the defendant paper company to continue its operation at its current pollution level, would seem to be of a value greater than $10,000. Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972); cf. Biechele v. Norfolk & Western Ry., 309 F. Supp. 354, 355 (N.D. Ohio 1969). Having succeeded in asserting federal jurisdiction over their (b)(2) claim for injunctive relief, *the same plaintiffs* could then have joined their (b)(3) claim for compensatory and punitive damages, and invoked the court's ancillary jurisdiction over this claim.

In the future, plaintiffs in a situation similar to the *Zahn* situation may have the alternative of bringing suit under § 505(a)(1)(A) of the recently amended Federal Water Pollution Control Act, Pub. L. No. 92-500 (Oct. 18, 1972), which appears in modified form at 33 U.S.C.A. § 1365 (Supp. 1973). This section provides:

> Sec. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
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> *The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties*, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act. . . . (Emphasis added.)

Once jurisdiction has attached under this Act, plaintiffs may append their claim for damages. This alternative was not available to Zahn and his co-plaintiffs, however, as the former Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970), did not provide for citizen suits.

89 364 F.2d at 564.

90 262 F. Supp. 106, 108 (E.D. Pa. 1966).

91 415 F.2d 809 (8th Cir. 1969).

to the state courts. This holding was deemed supported by the *Gibbs* doctrine, since the husband's and wife's claims derived from a "common nucleus of operative fact" and were such that they would ordinarily be expected to be tried in one judicial proceeding.[92]

Thus, a strong case has been made in the federal courts for the application of the doctrine of ancillary jurisdiction in joinder cases where one or more co-plaintiffs do not have the requisite amount in controversy. It is submitted that this doctrine should be extended one step further and applied to those plaintiffs in a class action who fail to meet the jurisdictional amount requirement, where jurisdiction has been properly established by the named plaintiffs of the class. Neither the federal jurisdiction statutes nor the prohibition against aggregation of separate and distinct claims would be violated by permitting the entire class to remain in federal court.[93] On the contrary, this appears to be the most satisfactory method of balancing the policies behind the jurisdictional statutes with those behind the new Federal Rule 23.

Conclusion

The Second Circuit's reliance on *Snyder v. Harris* in its opinion in *Zahn v. International Paper Co.* was misplaced and unfortunate. *Zahn* is readily distinguishable from *Snyder* both on its facts and on the basis of the underlying policy considerations. Application of the *Snyder* decision to the facts of *Zahn* actually undermines the policy of *Snyder* in favor of easing the burden on the federal courts. Such application in effect results in an increase in the federal caseload as well as the state caseload, as plaintiffs are forced to bring separate actions in the federal and state courts rather than uniting in one suit in federal court. On the other hand, application of the doctrine of ancillary jurisdiction in order to allow all plaintiffs in *Zahn* to join in a single class action would give effect to the *Snyder* policy of easing the burden on the federal courts without violating the traditional aggregation rule reiterated in *Snyder*. In addition, application of this doctrine would afford the small claimant a chance to litigate his legitimate grievances, where litigation might otherwise be beyond his means.

It is hoped that the Supreme Court will grant certiorari in this case,[94] and define once and for all the limits of the doctrine of ancillary jurisdiction. By extending this doctrine to allow federal jurisdiction over the entire class in *Zahn*, the harsh rule of *Snyder v. Harris* can be somewhat mitigated.*

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[92] Id. at 816.

[93] Cf. Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905, 907 (N.D. Ill. 1966).

[94] Petition for cert. filed, 41 U.S.L.W. 3357 (U.S. Dec. 12, 1972) (No. 72-888).

* After this note went to press, the Supreme Court granted certiorari in Zahn v. International Paper Co., 41 U.S.L.W. 3447 (U.S. Feb. 20, 1972) (No. 72-888).